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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Snake River Brewing Company, Inc.
v.
Lewis & Clark Snake River Beverage Company

Opposition No. 98,455
to application Serial No. 74/561,684
filed on August 16, 1994

Ann C. McMillan of Caplin & Drysdale Chartered for Snake
River Brewing Company, Inc.

Bruce A. Tassan of Jackson & Kelly for Lewis & Clark Snake
River Beverage Company.

Before Sams, Simms and Hairston, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

Snake River Brewing Company, Inc. (opposer), a Wyoming
corporation, has opposed the application of Lewis & Clark
Snake River Beverage Company to register the mark LEWIS &
CLARK SNAKE RIVER BEVERAGE COMPANY for non-carbonated soft
drinks.¹ In the application, applicant has disclaimed the

¹ Application Serial No. 74/561,684, filed August 16, 1994,
based upon applicant's bona fide intention to use the mark in

words "BEVERAGE COMPANY" apart from the mark as shown. In the notice of opposition, opposer pleads that it has filed an application to register the mark SNAKE RIVER for beer, claiming use since on or before June 30, 1994; that opposer's use precedes applicant's use and applicant's filing date; that opposer sells beer under the mark SNAKE RIVER; and that applicant's mark so resembles opposer's mark as to be likely to cause confusion, to cause mistake or to deceive. In its answer, applicant has denied the essential allegations of the opposition but has admitted that opposer owns the application wherein the Examining Attorney has stated that there may be a likelihood of confusion between opposer's mark and applicant's marks. (Applicant has filed several applications, including one to register SNAKE RIVER alone.) Applicant has also asserted in its answer that it has prior use.

The record of this case includes testimony (and exhibits) submitted by both parties; opposer's application file and applicant's answers to some of opposer's interrogatories, relied upon by opposer's notice of reliance; stipulations relating to testimony of opposer's president, Mr. Albert Upsher;² and the involved application

commerce pursuant to Section 1(b) of the Act, 15 USC Section 1051(b).

² Applicant has objected to one of these stipulations on the grounds that facts relating to opposer's contacts with potential distributors in 1993 is "untimely new evidence and evidence not within the scope of rebuttal testimony." We agree. Applicant,

file. Applicant filed a request for an oral hearing, but the Board denied that request as untimely in a ruling issued on March 4, 1997.³

According to the testimony of Mr. Albert Upsher, opposer's president and principal stockholder, opposer was incorporated in December 1992. Around that time (November 25, 1992), an article appeared in Jackson Hole News entitled "Jackson brewery, pub plans opening":

This Snake's for you.

Well, maybe that won't be the slogan when Albert Upsher serves up his first glass of beer in Jackson next year, but it could be, because one of the names he's registered is Snake River Bitter.

Opposer applied for a microbrewery permit in December 1992 and notice of that application naming the Snake River Brewing Company was published in a local newspaper. The permit was issued in May 1993. Also, in 1993 opposer met with label designers and finalized designs for the label to

in its answer, denied the allegations with respect to opposer's priority, and in fact asserted that it (applicant) had priority. Opposer was, therefore, on notice that it had to establish prior use. "Rebuttal" testimony relating to proposed labels featuring opposer's mark SNAKE RIVER and phone calls made in 1993 with potential distributors wherein they were informed of the trademark to be used on opposer's beer are not rebuttal of any testimony or evidence of applicant's but rather amplification of opposer's main case. This testimony should have been the subject of opposer's testimony-in-chief. Accordingly, this testimony must be disregarded. However, even if it were considered, it would not change the result, as explained in our opinion.

³ In that ruling, the Board inadvertently stated that the request was filed by opposer.

be used on its beer. Opposer also met with a potential distributor and began hiring people to work in its brew pub in late summer of 1993. On March 25, 1994, opposer opened its brew pub in Jackson, Wyoming. Upsher dep., 6, 17. A newspaper article concerning the opening of this brew pub appeared in the Jackson Hole News on March 30, 1994. That article notes, among other things:

Upsher's brew master, Curtis Holland, already has three brews on tap. Snake River Ale is an American-style, dry hops beer; the Alpine Fest Bier is a Vienna-style beer, with a caramel taste; and the Zonker Stout is a full-bodied beer with a coffee flavor...

Mr. Upsher testified that the SNAKE RIVER mark appeared on tap handles in opposer's establishment. Upsher dep., 20. On June 30, 1994, opposer began selling its SNAKE RIVER beer in bottles. Upsher dep., 29. Promotional merchandise bearing the mark was delivered to opposer's brew pub in July 1994. Opposer primarily distributes its beer through grocery stores in Wyoming, Colorado, Idaho, Montana and California.

Opposer also offered in evidence the testimony of Mr. Anthony Maratea, a distributor of opposer's products, who testified about several instances of actual confusion in the use of the parties' respective marks on their respective products.

For applicant's case, applicant's cofounder and chairman of the board, Mr. Lee Strader, testified that a business partnership was formed in January 1994 and later incorporated in March 1994. In connection with applicant's attempts to start a soft drink business, applicant's officers met with a marketing development company and potential investors in February 1994. In March 1994 sample product bearing the mark was sent to potential investors as well as potential distributors. Commercial sale of applicant's soft drinks commenced in August 1994 with the sales in that year exceeding \$300,000. Sales grew to between \$6 and \$8 million in 1996. Applicant now sells its products in Idaho, Oklahoma, Texas, California, Louisiana and New England. On cross-examination, Mr. Strader was asked about an alleged instance of actual confusion by one of applicant's distributors, at 35:

Q. Do you remember anything in particular that any one of them said in expressing this or asking this question?

A. It was just a simple, you know, are you associated with or are you part of the Snake River Brewing Company.

Q. Okay.

A. In fact, I believe one person mentioned that they were already doing business with us and, you know, obviously we asked what they meant by that. Then we realized that they weren't.

They were doing it with a beer company. We knew they weren't doing business with us, we just followed it up with questions.

Applicant has also stated in its interrogatory responses that 5 or 6 of its distributors have inquired as to whether there is a relationship between the parties.

Although, in its answer to the notice of opposition, applicant has denied likelihood of confusion, applicant has now conceded that issue. See Applicant's brief, p. 1. Applicant's concession is understandable in view of the evidence of record, which clearly supports a finding that confusion is likely. And we so find.

Concerning this issue, opposer argues that the record establishes that beer and soft drinks are sold in the same channels of trade and that confusion is likely, especially when considering applicant's actual manner of use of the mark (shown below).



Opposer also points to the testimony with respect to instances of actual confusion.

As opposer notes, applicant has used the mark sought to be registered in such a manner as to prominently feature the

words SNAKE RIVER. We believe that the general public, familiar with opposer's SNAKE RIVER beer, who then encounter applicant's mark, especially in the manner in which applicant actually uses the mark sought to be registered, will believe that the products of the parties come from the same source or that applicant's soft drinks are produced or marketed under license or with permission by opposer. See *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984) ("Ordinarily, for a word mark we do not look to the trade dress, which can be changed at any time...But the trade dress may nevertheless provide evidence of whether the word mark projects a confusingly similar commercial impression. Applicant's labels support rather than negate that of which opposer complains...").

While conceding the issue of likelihood of confusion, applicant argues that, nonetheless, the opposition should be dismissed because the record establishes applicant's priority of use. Applicant argues that the evidence shows that it used its mark in the solicitation of distributors for its product prior to any use of opposer's mark in the advertising of opposer's goods. Opposer, on the other hand, argues that "distributions" by applicant to prospective distributors and investors are not sufficient to establish priority and that the evidence establishes that opposer was

the first to commence an open and public use of its mark so as to create in the mind of the public an association of the mark with opposer's goods. It is opposer's position that the exposure to prospective investors does not create any awareness of the mark in the mind of the consuming public but that, even if applicant is correct in its argument that it does create such an awareness, opposer has priority in this regard because it contacted potential distributors before applicant did. Conceding that applicant's first "public use" occurred in April or May 1994 when applicant first advertised its goods in a local newspaper,⁴ opposer argues that this use was nevertheless subsequent to opposer's first open and public use (March 25, 1994) when it opened its brew pub and sold beer from the tap under the mark SNAKE RIVER.

An opposition to an application may be based upon prior use of a trademark or service mark or a trade name, or on prior use of a term in a manner analogous to trademark use. However, in the latter case, such an opposition may succeed only where the analogous use is of such a nature and extent as to create a public identification of the asserted mark in the minds of the relevant public with opposer's product. See *T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996); and *National Cable Television*

⁴ The testimony (Strader dep., at 36-38) concerning this advertisement is somewhat equivocal, and this advertisement was

Association, Inc. v. American Cinema Editors, Inc., 937 F.2d 1572, 19 USPQ2d 1424 (Fed. Cir. 1991). In the PacTel case, the Court stated, at 1881, 1882:

It is well settled that one may ground one's opposition to an application on the prior use of a term in a manner analogous to service mark or trademark use...Such an "analogous use" opposition can succeed, however, only where the analogous use is of such a nature and extent as to create public identification of the target term with the opposer's product or service...

An unbroken line of precedents of both this court and the Board make clear that activities claimed to constitute analogous use must have substantial impact on the purchasing public.

After careful review of this record, it is clear that, prior to commercial use of the respective marks by each party, there is simply insufficient proof that the exposure of the marks to potential distributors and/or investors had a substantial impact upon the purchasing public. Even conceding, as opposer has done, that applicant is entitled to rely upon its advertisement in April or May 1994, opposer has shown that its commercial use of the mark SNAKE RIVER in connection with beer commenced prior to this time (i.e. March 25, 1994). Accordingly, we find that opposer has established its priority.

never made of record.

Opposition No. 98,455

Decision: The opposition is sustained and registration to applicant is refused.

J. D. Sams

R. L. Simms

P. T. Hairston
Administrative
Trademark Judges,
Trademark Trial and
Appeal Board